

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Liberties Utilities (Midstates Natural)	
Gas) Corp. d/b/a Liberty Utilities)	
)	Docket No. 14-0371
Proposed General Increase)	
in Natural Gas Rates)	

**STAFF OF THE ILLINOIS COMMERCE COMMISSION
REPLY TO THE COMPANY’S RESPONSE TO STAFF’S MOTION TO STRIKE
PORTIONS OF THE REBUTTAL TESTIMONY OF COMPANY WITNESS ROBERT B.
HEVERT**

The Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned attorneys and pursuant to Sections 200.190 of the Commission’s Rules of Practice, 83 Ill. Adm. Code 200.190 and the ruling of the Administrative Law Judge on September 16, 2014, files its Reply to the Company’s Response to Staff’s Motion to Strike Portions of the Rebuttal Testimony of Company Witness Robert B. Hevert. For its reply, Staff states as follows:

1. On September 16, 2014, Staff filed a Motion to Strike Portions of the Rebuttal Testimony of Company Witness Robert B. Hevert (“Staff Motion to Strike”).
2. On September 23, 2014, Liberty Utilities Corp. (“Liberty” or the “Company”) filed the Company’s Response to Staff’s Motion to Strike Portions of the Rebuttal Testimony of Company Witness Robert B. Hevert (“Company’s September 23rd Response”).

The Rebuttal Testimony of Mr. Hevert was not within the scope of rebuttal

3. In its argument that the rebuttal testimony of Mr. Hevert was within the scope of rebuttal and that Staff witness Rochelle Phipps direct testimony argues the Commission

should not adopt Mr. Hevert's return on equity recommendation, the Company states that Mr. Hevert's testimony responds to those statements in a number of ways—including by using more recent data to show that Ms. Phipps' criticism is incorrect and that his recommendations are valid and borne out by the use of more recent data. (Company's September 23rd Response, p. 1)

4. The direct testimony of Ms. Phipps criticized Mr. Hevert's *methodologies* (i.e., risk premium) and inputs (DCF growth rates), and regarding CAPM: use of forecasted risk-free rate, 18-month beta, and including non-dividend paying companies in the market rate of return. She did not criticize the data of his analysis as being too out of date or otherwise as being unsuitable for estimating Liberty Midstates' cost of equity ("COE"). By updating his analysis, Mr. Hevert does not respond to Ms. Phipps' criticisms of Mr. Hevert's analysis; rather, he presents a new analysis altogether. (Staff Exhibit 3.0, pp. 10-34)

5. In addition, the Company argues that "updating the ROE analyses was necessary to determine whether market conditions had changed significantly enough since the submission of Mr. Hevert's pre-filed direct testimony to alter Mr. Hevert's assessment of investor's required return. The more recent data continues to support Mr. Hevert's recommendations." (Company's September 23rd Response, p. 2)

6. This is not the purpose of rebuttal testimony. As indicated in Staff' Motion to Strike, the procedural schedule adopted in this hearing did not call for the Company to provide updates in its rebuttal testimony filing. Mr. Hevert's updated cost of equity analyses was not necessary and was not called for in the schedule.

7. The Company further argues that “Previously Staff has taken the position that updated information is useful. For example, last year Staff witness Phipps argued in favor of using more recent data rather than five month old data.” (Company’s September 23rd Response, p. 2 – citing to Staff Ex. 14.0 in Docket No. 13-0192)

8. The Company cites Ms. Phipps’ rebuttal testimony in Docket No. 13-0192, but provides no page citation. Presumably the Company is referring to the fact that Ms. Phipps updated her analysis in Docket No. 13-0192 in rebuttal. However, it is important to note that the update was only in response to a Company update in rebuttal. Further, in that case, the measurement date was arguably an issue in direct testimony (although Staff did not argue that the Company’s COE measurement period was inappropriate.) Staff used a different period to estimate COE than the Company had. (In direct testimony, Ms. Phipps used the date May 23, 2013: Staff Ex. 5.0, Schedules 5.08 and 5.11; Mr. Hevert, on behalf of Ameren, used the period ending November 30, 2012. See Ameren Ex. 5.0, p. 18, 22, 26, 29, 55, fn 18, fn 21, fn 41) In this case, Staff decided to use the same measurement period as Liberty to reduce the number of issues. Liberty does not have the option to expand the number of issues in rebuttal.

9. The Company argues Ms. Phipps testified that: “Only the most recently available stock price will reflect all information that is available and relevant to the market. Further research has found that the last observed security price is the best estimator of future security prices.” (Company’s September 23rd Response, p. 2 – citing to Staff Ex. 14.0 in Docket No. 13-0192)

10. The Company is citing testimony in Docket No. 13-0192. Staff elected not to use the most recent market information available to Staff when it performed its ROR

analysis in this case to reduce the number of issues to be litigated. The purpose of rebuttal testimony in this case is for responding to testimony in this case, not to testimony in Docket No. 13-0192.

11. The Company also asserts Staff has “flip-flopped” (Company’s September 23rd Response, p. 2) regarding the usefulness of more recent data in this docket does not mean that it has no relevance in responding to Ms. Phipps’ criticisms. The Company contends that it should be able to argue that the fact that more recent data continues to support the Commission’s adoption of Mr. Hevert’s ROE recommendations despite Ms. Phipps’ attempts (relying on older data) at criticism. (Company’s September 23rd Response, p. 2)

12. It is disingenuous to claim that Staff has “flip-flopped” regarding the usefulness of more recent data. Staff has not flip-flopped on the usefulness of more recent data. Staff made a decision on which aspects of Mr. Hevert’s analysis to contest. The issue at hand is Mr. Hevert’s COE methodology and Staff’s revisions to it, not the date of Hevert’s analysis. Also, the Company fails to explain how updating Mr. Hevert’s COE analysis is in any way responsive to Staff’s criticisms of that analysis or how it refutes the manner in which Staff revised his COE analysis.

13. The Company argues that however, in her prefiled direct testimony Ms. Phipps actually states that she did examine updated bond yield information along with the DCF and risk premium analyses. (Company’s September 23rd Response, p. 3)

14. What Ms. Phipps did in her direct testimony was to compare her COE recommendation to the yield on Baa-rated debt on January 28, 2014, which is concurrent with the January 31, 2014 measurement period that both Mr. Hevert and

Staff used for COE analysis. Ms. Phipps also compared her recommendation to July 22, 2014 Baa-rated debt yields; however, Ms. Phipps did not make any adjustment to her COE recommendation due to the decline in Baa-rated debt yields between January 28, 2014 and July 22, 2014. (Staff Ex. 3.0, fn 64) This would certainly give the Company grounds for comparing its COE request to July 22, 2014 Baa-rated debt yields but it does not provide grounds for updating its entire COE analysis. If Staff had found the January 31, 2014 COE analysis wanting due to the decline in Baa-rated debt yields, the Company arguably would have a case for updating its entire COE analysis, but Staff did not do this. Thus, the January 31, 2014 measurement date of the COE is not an issue in the proceeding and the Company does not have the option for moving the goal posts whenever it sees fit.

Staff has shown it is prejudiced by the Company's Untimely Filing

15. The Company's next argument is that the Staff is not prejudiced by the portions of the filing of Mr. Hevert's rebuttal testimony that Staff seeks to strike and that Staff provided no support for this statement. The prejudice to Staff is stated throughout the Motion to Strike. The updates to the direct testimony of Mr. Hevert regarding his set of calculations and analytical results with respect to COE are beyond the scope of proper rebuttal. It is not the responsibility of Staff to expend time in order to respond on matters that have not been previously and properly raised. That is a prejudice. Further, if Mr. Hevert continually updated his cost of equity analysis, it is a perpetual invitation to continually update this information since market data changes everyday. (Staff Motion to Strike, p. 2) Responding to constantly updated data is not necessary and diverts the ALJ's and Commission's attention from more important issues involving methodology.

For the reasons explained in paragraph 8 above, the circumstances surrounding Docket No. 13-0192 are different than those in this docket.

16. The Company contends that Staff misunderstands the Constitution regarding the due process reference in Staff's Motion to Strike. Unfortunately, it is the Company that fails to understand what is meant by due process. The due process that Staff references in its Motion is the fundamental principle of fairness in all legal matters and does not only apply to a person. Due process requires a fair trial before a fair tribunal and applies to both courts and administrative agencies performing adjudicatory functions. *Arvia v. Madigan*, 209 Ill.2d 520, 540, 283 Ill.Dec. 895, 809 N.E.2d 88 (2004). The court has a duty to examine the procedural methods employed at an administrative hearing to ensure that it was a fair and impartial hearing. *Anderson v. Human Rights Comm'n*, 314 Ill.App.3d 35, 41, 246 Ill.Dec. 843, 731 N.E.2d 371 (2000) ("Anderson"). Due process also requires that all parties have an opportunity to cross-examine witnesses and offer rebuttal evidence. *Anderson*, 314 Ill.App.3d 35, 41.

All legal procedures, including striking testimony that is not responsive to direct testimony, must be followed by the court to ensure a hearing is fair and impartial to both sides. Due process or fairness in adhering to rules applies equally to both parties in this administrative proceeding.

17. Finally, Staff is perplexed by the Company's contention that Mr. Hevert's rebuttal testimony in this docket merely continues "a long standing practice to provide the Commission with more recent (and therefore more relevant) capital market information during rebuttal testimony." (Company's September 23rd Response, p. 4) The Company has provided no support to substantiate this conclusory statement.

Allowing Inadmissible Testimony is never discretionary

18. The Company's claim that admission of this testimony is discretionary is in error. It defeats the point of having successive rounds of testimony to narrow issues that Liberty believes it can raise new information that belonged in its direct testimony or is not proper rebuttal. As stated above, in her direct testimony, Ms. Phipps criticized Mr. Hevert's *methodologies* and inputs, and regarding CAPM: use of forecasted risk-free rate, 18-month beta, and including non-dividend paying companies in the market rate of return. She did not criticize the date of his analysis as being too out-of-date or otherwise as being unsuitable for estimating Liberty Midstates' cost of equity ("COE"). Updating an analysis does not respond to Ms. Phipps' criticisms of Mr. Hevert's analyses and the Commission should not empower the Company by giving it discretion to make a filing with more recent information. Updates to a party's case in chief are clearly beyond the scope of proper rebuttal testimony.

19. Staff continues to move to strike the following language in Company Ex. 7.0:

Page 2, lines 26-28: My Rebuttal Testimony also provides an updated set of calculations and analytical results with respect to the Company's Cost of Equity in this proceeding.;

Page 2, line 28: analyses and;

Page 2, line 29: in Schedules 7.1 through 7.17;

Page 2, line 37: • Section V – Provides my updated analyses;

Page 5, lines 89 through 97;

Page 6, all of Table 1: Summary of Analytical Results;

Pages 51-54, lines 961 through 1017 and all the tables contained in the above noted lines; and

Page 54, line 1021: My updated analytical results are provided in Schedules 7.1 through 7.11.

WHEREFORE, for the foregoing reasons, Staff respectfully requests that the Administrative Law Judge:

A. Strike the following identified portions of the Company Ex. 7.0.

Page 2, lines 26-28: My Rebuttal Testimony also provides an updated set of calculations and analytical results with respect to the Company's Cost of Equity in this proceeding.;

Page 2, line 28: analyses and;

Page 2, line 29: in Schedules 7.1 through 7.17;

Page 2, line 37: • Section V – Provides my updated analyses;

Page 5, lines 89 through 97 in their entirety;

Page 6, all of Table 1: Summary of Analytical Results;

Pages 51-54, lines 961 through 1017 and all the tables contained in the above noted lines; and

Page 54, line 1021: My updated analytical results are provided in Schedules 7.1 through 7.11.

B. As a result of the above stricken language, the following line would need to be amended for consistency on the number of remaining schedules:

Page 2, line 29: in Schedules 7.11 through 7.17.

- C. That Liberty be ordered to refile the affected testimonies and exhibits after they have been corrected to remove any affects from the stricken material; and
- D. Such other and further relief, as is equitable and appropriate.

Respectfully submitted,

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